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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROY ROMER, AS GOVERNOR OF THE STATE OF COLORADO, AND THE STATE OF COLORADO,

Petitioners,

—v.—

RICHARD G. EVANS, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does "Amendment 2," a popularly enacted state constitutional amendment that bars state and local government from enacting any laws or policies that prohibit, or otherwise attempt to end, discrimination against gay men, lesbians, and bisexuals, violate the Equal Protection Clause?

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The American Bar Association ("ABA") respectfully submits this brief *amicus curiae* in support of Respondents, pursuant to Rule 37 of the Rules of the Supreme Court. Letters of consent from all parties to the filing of this brief have been lodged with the Clerk of the Court.

INTEREST OF *AMICUS*

The American Bar Association, with approximately 340,000 members across the United States, is the leading national membership organization of the legal profession. Its

members include attorneys in private practice, attorneys for nonprofit organizations and for corporations, prosecutors, public defenders, federal and state trial and appellate judges, legislators, law professors and students, and nonlawyer associates in related fields.

The Association has adopted numerous policies that seek to rid the legal profession, the judicial process, and the laws of this country of bias, including bias against gay men, lesbians, and bisexuals. Among these is a policy adopted by the ABA House of Delegates in February 1989 "urg[ing] the Federal government, the states and the local governments to enact legislation, subject to such exceptions as may be appropriate, prohibiting discrimination on the basis of sexual orientation in employment, housing and public accommodations."

The challenged state constitutional amendment ("Amendment 2"), if allowed to stand, would bar the enactment of such legislation and nullify existing laws and regulations that prohibit discrimination against gay men, lesbians, and bisexuals in housing, workplaces, and other public settings and government agencies in Colorado.

The ABA therefore has a strong interest in the matter before the Court.[1]

SUMMARY OF ARGUMENT

The Colorado Supreme Court struck down Amendment 2 on the ground that it infringes upon the fundamental right to equal participation in the political process and is not narrowly

[1] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Administration Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Administration Division Council prior to filing.

tailored to achieve a compelling state interest. We support that conclusion and the court's analysis. However, we argue here that Amendment 2 cannot survive judicial scrutiny even under the rational basis test.

Where there is no reason to suspect that a classification is based upon illegitimate state purposes, or where the classification concerns such matters as economic, tax, or cash benefit programs, the rational basis standard is applied in an exceedingly deferential fashion. However, where the reviewing court finds evidence that irrational prejudice or other illegitimate state purposes played a role in the challenged classification, the court applies the standard with greater rigor. Thus, in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448-450 (1985), the Court not only set aside the illegitimate state interests that appeared on the record, but also conducted a thorough and searching review of the other interests proffered by the City to ensure that the illegitimate purposes were not, in fact, the sole basis for the classification.

In this case, at least four of the purposes that have been advanced by Petitioners are illegitimate state interests aimed at silencing political debate and enshrining private prejudices in the state constitution. Such a record triggers the careful rational basis review that *Cleburne* prescribes. As in that case, once the illegitimate purposes have been set aside, none of Petitioners' other claimed state interests can explain the singling out of the targeted group. "The short of it is" that Amendment 2's classification "rest[s] on . . . irrational prejudice," *Cleburne*, 473 U.S. at 450, and even the apparently legitimate purposes asserted by Petitioners can find no "footing in the realities of the subject addressed," *Heller v. Doe*, 509 U.S. ___, 113 S. Ct. 2637, 2643 (1993).

ARGUMENT

AMENDMENT 2 DOES NOT RATIONALLY ADVANCE ANY LEGITIMATE GOVERNMENT INTEREST AND VIOLATES RESPONDENTS' RIGHT TO EQUAL PROTECTION OF THE LAWS

Amendment 2 carves out the group of gay men, lesbians, and bisexuals—and only that group—from any current or future law or government policy that provides for "minority status, quota preferences, protected status[,] or claim[s] of discrimination." If the amendment were allowed to stand, gay men, lesbians, and bisexuals would be unable to rely on such current provisions as the Governor's executive order and the laws in Denver, Boulder, and Aspen that bar sexual orientation discrimination, nor could they lobby their state or local legislators to adopt new laws or regulations that would prohibit such discrimination. Neither could they urge the enforcement of disciplinary standards, such as the Model Code of Judicial Conduct, that would prohibit bias against gay men, lesbians, and bisexuals in the workings of the legal system or in other regulated professions. In short, no government statutes, regulations, or policies that recognize gay men, lesbians, and bisexuals as members of a minority group, or provide them with "protected status" and legally cognizable claims of discrimination, could exist in the State of Colorado if Amendment 2 were given effect.

In contrast, laws or policies that prohibit discrimination on the basis of sexual orientation would not be affected by Amendment 2 to the extent that they confer protection on *heterosexuals*. Under the Amendment, gay men, lesbians, and bisexuals would be the *only group* in the State of Colorado that could not seek a remedy at law for unjustified adverse treatment.

Amendment 2 does not rationally advance any legitimate government interest and cannot survive scrutiny even under the most lenient level of equal protection review.

I. The Proper Application Of The Rational Basis Standard In This Case

A single rational basis standard governs all instances of lowest-level equal protection review. That standard requires that there be "a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 113 S. Ct. at 2642. The test thus embodies two elements, each of which must be satisfied: "(1) Does the challenged [enactment] have a legitimate purpose? and (2) Was it reasonable for [those who adopted the measure] to believe that use of the challenged classification would promote that purpose?" *Western and Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 668 (1981).

A. The Presence Of Illegitimate State Purposes Requires That Other Proffered State Interests Be Examined With Particular Care

The specific application of the rational basis test depends upon the factual circumstances of each case. Where the record reveals that one or more illegitimate state interests played a role in the challenged classification, the Court not only sets those interests aside, but also reviews any other proffered interests with particular care to ensure that impermissible state objectives were not, in fact, the sole basis for the classification. *See Cleburne v. Cleburne Living Center*, 473 U.S. at 448-450.

In such cases, moreover, the Court does not itself attempt to conceive of some legitimate, rational explanation for the classification that was never advanced by the government defendant, but instead considers only the additional government purposes actually put forward by the state. *See, e.g.*,

Cleburne, 473 U.S. at 449-50; *Zobel v. Williams*, 457 U.S. 55, 61-65 (1982); *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534-38 (1973). To do otherwise would be to disregard the actual evidence of illegitimate government goals, thereby involving the judiciary in efforts to resuscitate classifications that fail the rational basis test.

Thus, in *Cleburne*, the Court began its rational basis analysis by highlighting the illegitimate government interests that the City of Cleburne relied upon in attempting to justify its differential zoning treatment of a group home for the mentally retarded:

> First, the Council was concerned with the negative attitudes of the majority of property owners . . . . But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic.

473 U.S. at 448 (citation omitted).[2] After pointing to such evidence of improper state goals, the Court closely examined

[2] *See also id.* at 449 ("[the Council] was concerned that the facility was across the street from a junior high school, and it feared that the students might harass the occupants of the Featherston home. But the school itself is attended by about 30 mentally retarded students, and denying a permit based on such vague, undifferentiated fears is again permitting some portion of the community to validate what would otherwise be an equal protection violation."). *Compare Heller*, 113 S. Ct. 2637, in which the Court had before it no evidence of any animus against the mentally retarded. Even in upholding the statute based on such a record, the Court conducted an extensive analysis to determine whether the classification met the rational basis test.

other, apparently legitimate proffered interests—concern with the possibility of a flood, concern about legal liability, concern with overcrowding within the home, and concern with neighborhood congestion—and determined that the City's singling out of the home for the mentally retarded did not rationally serve any of those interests. *Cleburne*, 473 U.S. at 449-50. The Court stopped its analysis there, without attempting to generate some rational and legitimate explanation for the disparate treatment; instead, *Cleburne* held that the discriminatory zoning action violated the Equal Protection Clause because it "appears to us to rest on an irrational prejudice[.]" 473 U.S. at 450.

As the Court concluded, state purposes that embody such prejudice against a disfavored group cannot be countenanced. *Cleburne*, 473 U.S. at 448; *see also Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 878 (1985); *Moreno*, 413 U.S. at 534. It is, after all, only "*absent some reason to infer antipathy*" that the "Constitution presumes that . . . even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted[.]" *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (emphasis added), *quoted in FCC v. Beach Communications, Inc.*, 508 U.S. ___, 113 S. Ct. 2096, 2101 (1993).[3]

In contrast, the Court's decision in *FCC v. Beach Communications* demonstrates how the analysis properly proceeds when there is no indication that irrational prejudice or other illegitimate state purposes played a role in the enactment.

[3] *See also Cleburne*, 473 U.S. at 453 n.6 (Stevens, J., concurring) ("The Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a 'tradition of disfavor [for] a traditional classification is more likely to be used without pausing to consider its justification . . . . Habit, rather than analysis, makes it seem acceptable . . . . But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made.' ").

Beach Communications challenged the FCC's distinction between cable television facilities that served buildings under common ownership or management and those facilities that served separately owned and managed properties. Nothing in the record led the Court to conclude that an illegitimate government goal may have led to that distinction. The Court, therefore, examined only whether "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Communications*, 113 S.Ct at 2101. Relying on a conceivable rational basis first suggested, not by the government, but by a member of the court of appeals, the Court upheld the differential treatment with little hesitation. 113 S.Ct. at 2103-04.[4]

B. Economic, Tax, And Social Welfare Benefit Classifications Are Given The Utmost Deference; Classifications Dealing With Civil Rights Receive A Closer Examination

The degree of plausibility needed for a court to find that a classification is a "rational" means of furthering a particular legitimate state purpose also depends upon the general subject matter that the classification addresses. The judiciary is most deferential to lawmakers in cases involving (a) regulatory classifications that deal only with "ordinary commercial transactions," *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938),[5] (b) line-drawing in the context of taxation,

[4] *Compare also Moreno*, 413 U.S. at 534-38 (detailed application of rationality requirement to other proffered government goals, where Congress apparently crafted food stamp restriction out of an illegitimate " 'purpose to discriminate against hippies' "), *with Lyng v. Castillo*, 477 U.S. 635 (1986) (cursory review of food stamp restriction in case not involving evidence of any illegitimate government interest).

[5] *See id.* at 152, 154 ("regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional" where it "is at least debatable"); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813 (1976) ("a statutory classification[,] . . . especially one dealing only with economic matters, need not be drawn so as to fit with precision the

Nordlinger v. Hahn, 505 U.S. ___, 112 S. Ct. 2326, 2332 (1992),[6] or (c) the differential "distribution of [monetary] benefits" under government social welfare programs, *Bowen v. Owens*, 476 U.S. 340, 345 (1986).[7]

It is in these subject matter areas where a "one step at a time" justification often has rendered a classification rational enough to satisfy equal protection requirements. *See, e.g., Lyng v. Castillo*, 477 U.S. at 643; *Williamson v. Lee Optical*, 348 U.S. at 488-89; *see also FCC v. Beach Communications*, 113 S. Ct. at 2102. Even while accepting an incremental approach, however, the Court has required at least some plausible rationale for the increment. *See id.*; *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-66 (1981). Indeed, were it otherwise, arguing "one step at a time" would swallow the second prong of rational basis review altogether.

The Court's reluctance to second-guess the legislature in these areas reflects its recognition that economic, tax, and cash benefit programs depend on numerous, blunt classifications to operate in an efficient and viable manner. *See Califano v. Jobst*, 434 U.S. 47, 53 (1977) ("[g]eneral rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases"). On the other hand, where, as in the present

legitimate purposes animating it"); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488-89 (1955).

[6] *See id.* at 2336 (tax classification that is "not palpably arbitrary" is constitutional); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-60 (1973).

[7] *See id.* at 345 (distribution of benefits under large social welfare scheme "requires Congress to make many distinctions among classes of beneficiaries while making allocations from a finite fund. In that context, our review is deferential."); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 175 (1980); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

case, the Court is considering equal protection cases dealing with the availability of civil rights claims, the Court assesses the rationality or "fit" of the legislative classification with greater rigor. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438-42 (1982) (Blackmun, J., separate opinion) (finding classification of fair employment practices claims to have "so speculative and attenuated a connection to its [purported] goal" as to violate the rational basis test). "The State's rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, must have some objective basis." 455 U.S. at 442.

II. Four State Purposes Behind Amendment 2 Are Illegitimate

The record in this case reveals at least four illegitimate government interests that have been offered as justifications for Amendment 2. In considering whether a classification can satisfy each of the rational basis standard's two prongs, illegitimate factors that emerge at any stage of the enactment's history are relevant to the Court's analysis.[8] An impermissible state interest not only fails the first prong of the test, but also colors the Court's analysis, under the second prong, of any other, apparently permissible proffered goals. Where, as here, illegitimate state purposes are proffered and then gradually

[8] *See Moreno*, 413 U.S. at 534-35 (discussing illegitimate government interest apparent from the legislative history, but abandoned in the litigation); *Cleburne*, 473 U.S. at 448-49 (discussing illegitimate factors considered during deliberations of City Council); *Zobel*, 457 U.S. at 61-63 (discussing illegitimate goal advanced by the state in litigation). *See generally Hunter v. Underwood*, 471 U.S. 222, 228-29 (1985) (relying on history of state constitutional convention to discern an invidiously discriminatory purpose); *Reitman v. Mulkey*, 387 U.S. 369, 373, 378-79 (1967) (emphasizing, in equal protection challenge to popularly enacted state constitutional amendment, the propriety of examining "its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment' ").

abandoned as the government grasps for some satisfactory rationale, the shifting explanations underscore the need for closer judicial consideration.

A. Purposes Antithetical To The American Political System

1. Deterring Factional Debate On A Particular Political Issue Is Not A Valid State Objective

Throughout this litigation, Petitioners have argued that Amendment 2 serves not only a legitimate, but a compelling, state interest in deterring "factionalism." Pet. Brief at 47-48; Def. Colo. S. Ct. Brief at 44-49; Def. Tr. Brief at 59-61. Petitioners explain that the amendment arises out of "the necessity of ensuring that the deeply divisive issue of homosexuality does not serve to seriously fragment Colorado's body politic." Pet. Brief at 47; *see also* Def. Colo. S. Ct. Brief at 45 ("Amendment 2 is intended . . . to ensure that at some point the shouting in the room ceases, and a final decision is made on this divisive issue").[9]

This purportedly legitimate rationale was firmly and correctly rejected by the Colorado Supreme Court:

[9] That the goal of shutting down "divisive" political debate and activity on topics of interest to gay men and lesbians did, in fact, contribute to the passage of Amendment 2 was made clear at trial by Tony Marco, the founder of the Amendment 2 movement:

> [This measure] was necessary because it was obvious that the aggression of gay militants through the legislature was not going to cease. Secondly the legislature is very vulnerable to all kinds of lobbying and other activity without citizens' direct representation on that activity. Lobbying for which I discovered gay militants were very very well equipped and were very well experienced. And so the only way to insure that this kind of activity would stop would be through the passage of [a] constitutional amendment. . . . [T]his seemed the logical way to accomplish that purpose.

Trans. at 839.

> Political debate, even if characterized as "factionalism," is not an evil which the state has a legitimate interest in deterring but rather, constitutes the foundation of democracy. . . . We fail to see how the state, which is charged with serving the will of the people, can have any legitimate interest in preventing one side of a controversial debate from pressing its case before governmental bodies simply because it would prefer to avoid political controversy or "factionalism." *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)[.]

Pet. App. B-20 to -21. Indeed, as the trial court had stated, this "first claimed compelling state interest is *not* a compelling state interest. The *opposite* of defendants' first claimed compelling interest is most probably compelling." Pet. App. C-6 (emphasis in original).

Innumerable decisions of this Court underscore that the federal Constitution bars government from seeking to quell political controversy by silencing one faction. In *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989), for example, the Court emphasized that "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' " A state cannot " 'attempt[ ] to pick and choose among the views it is willing to have discussed' " or " 'try[ ] to prescribe by law what matters of public interest people . . . may and may not discuss. This . . . [is] censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments.' " *Carey v. Brown*, 447 U.S. 455, 463 n.7 (1980); *see also Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Rather than having identified a valid government interest in ending political "fragmentation" on the issue of homosexuality in their state, Def. Tr. Brief at 60-61; Pet. Brief at 47-48, Petitioners have exposed the illegitimate censorial and discriminatory motives behind

Amendment 2. Government, through initiative lawmaking or otherwise, simply cannot aim to "resol[ve] . . . [a] debate," Def. Colo. S. Ct. Brief at 45, that continues to fragment society.

Petitioners at times have argued separately that Amendment 2 is justified by an interest in "achieving statewide uniformity on this divisive issue." Def. Tr. Brief at 55; Brief in Support of Mot. to Dismiss at 76. To the extent that the proffered interest is an argument for uniform civil rights laws, it is addressed below at Part III (A), but Petitioners sometimes use the "uniformity" rubric to describe a supposed state interest in promoting unified public opinion. *See* Def. Tr. Brief at 55; Brief in Support of Mot. to Dismiss at 76; Def. Colo. S. Ct. Brief at 45. Put that way, the purported interest in uniformity is simply another way of expressing the illegitimate purpose of ending political fragmentation: imposed uniformity on the topic of homosexuality is what will remain if factional debate is deterred and the "shouting in the room" ceases, Def. Colo. S. Ct. Brief at 45. The curbing of political debate remains just as constitutionally infirm when done to achieve "uniformity" on a particular issue as when done to deter controversy among different groups. *See West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) ("[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).[10]

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[10] Of course, Amendment 2 does not mandate that citizens of Colorado hold a particular, uniform view of homosexuality, nor does it outlaw different factions that might form around "this divisive issue." In initially considering the legitimacy of an enactment's purposes, those goals are examined without regard to their rationality or chance of success. Here, Petitioners have explicitly offered, and the proponents of the initiative sought to achieve, plainly illegitimate state objectives. That fact is not altered by Amendment 2's implausible relation to those objectives.

(footnote continued)

2. The State, Without More, Has No Legitimate Interest In Barring Government Support For The Political Objectives Of A "Special Interest Group"

In each of the state courts, Petitioners argued that Amendment 2 serves the goal of preventing any government body from "supporting the political objectives of a special interest group." Def. Colo. S. Ct. Brief at 43; *see also* Def. Tr. Brief at 68.[11] The Colorado Supreme Court expressed astonishment that the state would claim such an interest: "Defendants offer no authority to support the rather remarkable proposition that the government has a compelling interest in seeing that the state does not support the political objectives of a 'special interest group.' . . . [V]irtually any law could be regarded as a benefit to a 'special interest group.' " Pet. App. B-20.

Indeed, a state cannot legitimately seek to handicap a "special interest group" in its lobbying and other advocacy efforts for the bare purpose of guaranteeing that group's failure in its appeals to the government. *See Moreno*, 413 U.S. at 534 ("if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest")(emphasis in original). Group-based political activity is specially valued and protected under the federal Constitution. As the Court explained in *Gilmore v. City of Montgomery*, 417 U.S. 556,

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(footnote continued from previous page)

Similarly, laws or policies prohibiting discrimination against gay men, lesbians, and bisexuals bar certain actions; they do not coerce opinion. Petitioners err in claiming that, without Amendment 2, they would be subjected to the "compelled endorsement of a particular viewpoint" in the purported form of nondiscrimination rules. Def. Colo. S. Ct. Brief at 44; Def. Tr. Brief at 69; *see also* Pet. Brief at 44.

[11] The history of Amendment 2 indicates that its proponents viewed gay men, lesbians, and bisexuals as dangerous because they "made up a very powerful special interest lobbying group." Trans. at 1041.

575 (1974), the fundamental "freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change." In *New York State Club Association, Inc. v. City of New York*, 487 U.S. 1 (1988), the Court reiterated:

> The ability and opportunity to combine with others to advance one's views is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals as against the government. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ." *NAACP v. Alabama ex rel. Patterson*, 357 US 449, 460 . . . (1958).

487 U.S. at 13.

Simply labelling a group as a "special interest" does not constitute a legitimate basis for excluding that group from any positive government response to its advocacy. If anything, the formation or identification of a "special interest group" broadens the range of First Amendment rights that shield its political activities.

B. Purposes That Sanctify Private Prejudice

1. The State Has A Strong Interest In Protecting The Well-Being Of Children; Such Interest, However, Is Not Legitimate Where Grounded In Myths And Unfounded Fears

Another previously articulated interest behind Amendment 2 that apparently has been abandoned by the state is the goal of "promot[ing] the physical and psychological well-being of our children." Def. Tr. Brief at 73. That the state has a legitimate interest in protecting children is beyond dispute; however, Amendment 2 in no way addresses that concern. Rather, proponents of the measure exploited the very real

problem of child abuse in order to play upon popular fears and myths about gay men.[12]

Before the trial court, Petitioners described Amendment 2 as serving this asserted state interest in the "well-being of our children" by "recogniz[ing] heterosexual marriage as the foundation of a stable family unit" or, alternatively, by "help[ing] to avert unnecessary suffering for those [young people] who may be influenced relative to their sexual preference by not lending government's voice to the debate." Def. Tr. Brief at 73, 75. Amendment 2, however, says nothing about marriage or families and, as even the state concedes, does "*not* lend[ ] government's voice to" any public discussion related to "unnecessary suffering." *Id.* at 75 (emphasis added). The trial court specifically found that "[i]f the . . . [proffered] interest is in protecting the psychological well-being of homosexual youth, the Court is unable to discern how allowing discrimination against them by virtue of the Colorado Constitution promotes their welfare." Pet. App. C-13 to -14.

In fact, the proponents of Amendment 2 played upon popular myths equating gay men with child molesters to fuel their campaign. Their campaign literature urged voters to say "no to sexual perversion with children—vote YES! on Amendment 2!" Pla. Tr. Exh. 22 at 2. Colorado for Family Values ("CFV") repeatedly and spuriously represented that "pedophilia (the sexual molestation of children) is actually an accepted part of the homosexual community!" and that:

[12] Even if a proffered state interest might under some circumstances be legitimate, it is rendered constitutionally impermissible if supported only by negative attitudes or fear. Here, the asserted state interest in the welfare of children is analogous to the asserted interest in protecting the mentally retarded from harassment in *Cleburne*: while protecting the mentally retarded may generally be a legitimate state concern, it is not legitimate when grounded only on "vague, undifferentiated fears" that junior high school students might harass retarded persons. 473 U.S. at 449.

> Though only 2% of the population, homosexuals commit between 1/3 and 1/2 of all recorded child molestations. Homosexual teachers commit as many as 4/5 of all pupil molestations. They are 12 times as likely as heterosexual teachers to molest children. "Gays" are 18 times more likely to incorporate children into their sexual practices as heterosexuals.

Pla. Tr. Exh. 22 at 2; Pla. Tr. Exh. 21 at 2.[13] The trial court soundly rejected these assertions:

> If the . . . [asserted state] interest relates to protecting children physically from pedophiles, the testimony of plaintiffs' witness Dr. Carole Jenny is more persuasive than anything presented by defendants. Dr. Jenny practices at Denver's Children's Hospital and made a study of persons who sexually abused children who were brought to that hospital. She indicated that pedophiles are predominantly heterosexuals, not homosexuals.

Pet. App. C-13.

Thus, if the purported state interest in protecting children has any relevance to this case, it is in exposing the fear- and prejudice-based appeals used by supporters of Amendment 2 to provoke a visceral, negative reaction. But "mere negative attitudes," " 'private biases' " and "vague, undifferentiated fears" cannot justify government's disparate treatment of different groups of citizens. *Cleburne*, 473 U.S. at 448, 449. To

[13] Plaintiffs' trial exhibit 22 is the main campaign tabloid urging approval of the initiative, of which 750,000 to 800,000 copies were circulated in Colorado prior to the Amendment 2 vote. Trans. at 735-36. (This compares with a printing of only approximately 204,000 copies of the state's ballot analysis. P.I. Trans. at 66.) Plaintiffs' trial exhibit 21 is a CFV brochure that emphasizes its claim that "One 'gay' pedophile organization's motto is 'Sex by 8 or it's too late.' " Pla. Tr. Exh. 21 at 2.

the extent that fearmongering with regard to pedophilia and other false notions about gay people led to the enactment of Amendment 2—and the history of that measure leaves no doubt that such biased views played a significant role—that basis for the classification is constitutionally illegitimate.

2. Serving "Prevailing Preferences" To Avoid Associations With Gay Men, Lesbians, And Bisexuals Is Not A Permissible Government Objective

Petitioners' brief attempts to justify Amendment 2 as follows: "eliminating anti-discrimination provisions that compel landowners and religious institutions to open their facilities to homosexuals and bisexuals is a rational means of *protecting* the legitimate *prevailing preferences* of the State's population." Pet. Brief at 13 (emphasis added). Similarly, the brief refers to the goal of "the preservation of traditional *social norms*." Pet. Brief at 47 (emphasis added); *see also id.* at 40. Those statements diverge from the state's proffered viewpoint-neutral interests in generally enhancing its citizens' constitutionally protected freedom of religion, freedom of association, and freedom within the family. *See infra* Part III (C) & (D). Here, Petitioners' claimed interest in furthering "prevailing preferences" and "social norms" is an impermissible government purpose because those phrases are merely other names for negative societal attitudes against gay men, lesbians, and bisexuals. *See also* Def. Colo. S. Ct. Brief at 39 (relying on the contention that "Coloradans as a whole have serious reservations regarding the homosexual lifestyle").

Although the majority may indeed dislike and not wish to associate with gay and bisexual citizens, such prevailing attitudes cannot be used to justify government action:

> [The state] may not avoid the strictures of [the Equal Protection Clause] by deferring to the wishes

> or objections of some fraction of the body politic. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 US 429, 433 . . . (1984).

Cleburne, 473 U.S. at 448. Surely, under *Cleburne*, a zoning decision "fencing out" lesbians, gay men, and bisexuals would not be defensible as a means of protecting prevailing preferences. If that is so, then fencing them off from the protection of anti-discrimination laws cannot be defended on that basis, either.

Whether prevailing negative attitudes about a group arise from predominant religious beliefs, moral sentiment, tradition or mere habit, or simply an unthinking groundswell of antipathy, such attitudes against a disfavored class are an improper basis for adverse treatment by the state. *See, e.g., Marks v. City of Chesapeake*, 883 F.2d 308, 309-13 (4th Cir. 1989) (government action ratifying citizens' religious and moral objections to fortune teller found illegitimate); *Islamic Center of Mississippi, Inc. v. City of Starkville*, 840 F.2d 293, 302 (5th Cir. 1988) (neighbors' unwillingness to accept adherents of "unfamiliar" religion ruled constitutionally impermissible basis for city's classification). Indeed, experience teaches that prejudice frequently is clothed in religious and moral terms. *See Loving v. Virginia*, 388 U.S. 1, 3 (1967) (separation of the races said to be ordained by the Almighty); *Moreno*, 413 U.S. at 535 n.7 (adverse treatment of "hippies" originally defended on moral grounds).

III. The Additional Proffered Justifications Fail Rationally To Explain Amendment 2's Classification

Once illegitimate purposes are set aside, none of Petitioners' other claimed state interests provides rational support for the discriminatory classification created by Amendment 2. The challenged scheme cannot find any "footing in the realities of the subject addressed." *Heller v. Doe*, 113 S. Ct. at

2643. Amendment 2 does not represent a "rough accommodation" or "imperfect fit," Pet. Brief at 40 n.27, that nevertheless rationally furthers a valid state purpose. Instead, even after considering Petitioners' many attempts to explain this enactment, one is left with no " 'plausible [and permissible] reasons' " for it. *FCC v. Beach Communications*, 113 S. Ct. at 2101.

A. Concerns About Minimal Government Or Efficient Legal Rules Do Not Justify Amendment 2's Line-Drawing

Under the general rubric of "enhanc[ing] individual freedoms," Petitioners contend that Amendment 2 promotes the state's interest in minimal government in accordance with "the time-honored view that '[t]hat government is best which governs least,' " Pet. Brief at 43, 46. Whatever the philosophical merits of this maxim may be, it fails completely as a rationale for the classification drawn by Amendment 2. It does not explain how the cause of limited government is furthered by eliminating anti-discrimination protections for lesbians, gay men, and bisexuals while retaining such protections for heterosexuals and every other covered group.

Moreover, a state interest in limited government could be invoked in support of *any* government decision to include one class, but exclude another, from legislation, since, in a sense, excluding part of the citizenry would always foster "less government." To permit such a result would effectively end meaningful rational basis review. *See Metropolitan Life Insurance Co. v. Ward*, 470 U.S. at 882 n.10 ("[i]ndeed, under the State's analysis, *any* discrimination subject to the rational relation level of scrutiny could be justified") (emphasis in original).

The state also argues that Amendment 2 provides "uniform civil rights laws," thereby promoting "efficient enforcement" and "an environment where large employers and property owners may operate" with greater predictability. Pet. Brief at

47. Yet Amendment 2 actually diminishes uniformity by permitting some to seek redress through the legislature, while prohibiting others from doing so. The amendment eliminates anti-discrimination protections for gay, lesbian, and bisexual individuals, but leaves in place a patchwork of state and local protections for other classes. Indeed, some, but not all, jurisdictions will continue to prohibit sexual orientation discrimination, albeit solely against heterosexuals.

Furthermore, the mere invocation of a desire for uniformity, without more, can never serve to rationalize a state's irrational decision to be "uniform" on a selective basis. Otherwise, the equal protection requirement that government line-drawing have some rational basis would, as a practical matter, cease to exist. As the Court stated in *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (citation omitted), "[t]he Equal Protection Clause requires more of a state law than nondiscriminatory [and thus uniform] application within the class it establishes. It also imposes a requirement of some rationality in the nature of the class singled out." *See also James v. Strange*, 407 U.S. 128, 140-41 (1972).

B. The Goal Of Reserving Discrimination Remedies For "Suspect And Other Needy Classes" Does Not Rationally Explain This Scheme

Petitioners also attempt to justify Amendment 2 by citing the state's interest in reserving its "limited resources" for "those who are particularly deserving of special protection," namely, "suspect and other needy classes." Pet. Brief at 13, 42. Once again, however, Petitioner's claimed rationale does not relate to the classification that Amendment 2 employs.

Amendment 2 leaves intact anti-discrimination protections for many other groups. Aspen's ordinance, for example, prohibits discrimination based on marital status, affectional orientation, family responsibility, and political affiliation. *See* Aspen Mun. Code § 13-98. Denver's law covers discrimination on the basis of military status. *See* Denver Rev. Mun.

Code, ch. 28, art. IV, § 28-91(b). Moreover, as noted above, Amendment 2 does not disturb existing (or future) protections for heterosexuals. None of the groups covered by those provisions is constitutionally "suspect." Petitioners fail to offer any rationale for thinking that categories such as marital status, military status, family responsibility, or heterosexuality plausibly describe groups more "needy" than lesbians, gay men, and bisexuals. In sum, Petitioners cannot explain how the state's limited resources will be conserved by an amendment that defines the "needy" to include *any and every conceivable group except* lesbians, gay men, and bisexuals.

C. First Amendment Freedoms Do Not Provide A Rational Basis For This Classification

Petitioners next attempt to find a rational basis for Amendment 2 in the state and federal constitutional rights to freedom of religion and intimate association. They argue that anti-discrimination laws interfere with private decisions not to employ or rent to others on religious grounds and with personal choices in forming intimate relationships. *See* Pet. Brief at 43-45.[14] Again, however, Petitioners' stated reasoning does not explain the classification used by Amendment 2.

Just as some individuals might wish to avoid associating with gay people, others might wish to refrain from employing,

[14] In the course of setting forth this supposed state interest, Petitioners erroneously claim that anti-discrimination laws would force individuals with religious or other beliefs that judge homosexuality negatively to "compromise those convictions." Pet. Brief at 44. Indeed, throughout this litigation, Petitioners have contended that anti-discrimination protections would force its citizens to "accept . . . a particular ideology" about homosexuality. Def. Tr. Brief at 69; *see also* Def. Colo. S. Ct. Brief at 43-44. However, many decisions of this Court explain that a non-discriminatory policy for access or hiring does not in any way interfere with the maintenance of personal beliefs or the ability to air those beliefs. *See, e.g., Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980). Laws prohibiting discrimination regulate actions, not thought.

renting to, or serving people who practice a different religious faith, or who are part of an unmarried or interracial couple. Like the city in *Cleburne*, Petitioners have not articulated any explanation for singling out lesbians, gay men, and bisexuals, when the proffered government interest would implicate many other groups as well.[15] Here, as in *Cleburne*, the challenged classification is not merely imprecise or underinclusive; it is irrational.

Indeed, far from increasing religious and associational freedoms in general, Amendment 2 privileges solely those religious views and associational decisions that reflect private bias against lesbians, gay men, and bisexuals. The Constitution, however, " 'places no value on discrimination,' . . . and while '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections.' " *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (quoting *Norwood v. Harrison*, 413 U.S. 455, 469-70 (1973)); *see also Hishon v. King & Spalding*, 467 U.S. at 78 (same).

D. Amendment 2 In No Way Relates To Parents' Ability To Teach Their Children Moral Values

Finally, Petitioners contend that the "implicit endorsement of homosexuality fostered by laws granting special protections could undermine the efforts of some parents to teach traditional moral values" and that Amendment 2, therefore, seeks to protect freedom within the family. Pet. Brief at 45-46. However, neither Amendment 2 nor the laws it prohibits

[15] *See, e.g., Cleburne*, 473 U.S. at 449, 450 ("concern with the possibility of a flood, however, can hardly be based on a distinction between the Featherston home and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the Featherston site without obtaining a special use permit"; " 'the City never justifies its apparent view that other people can live under such 'crowded' conditions when mentally retarded persons cannot' ").

affect the freedom of parents, whatever their values, to teach and raise their children as they see fit.

As the Colorado Supreme Court held, anti-discrimination laws do not constitute a governmental endorsement of particular value choices:

> [A]ntidiscrimination laws make no assumptions about the morality of protected classes—they simply recognize that certain characteristics, be they moral or immoral—have no relevance in enumerated commercial contexts.
>
> . . .
>
> [P]rohibitions on discrimination against gay men, lesbians, and bisexuals do not imply an endorsement of any particular sexual orientation and practices.

Pet. App. B-15; *see also supra* note 14.

Moreover, even the proponents of the amendment testified at trial that Amendment 2 makes no moral statement. Trans. at 726 (testimony of Wilford Perkins, chairman of the board of CFV, that Amendment 2 "doesn't say anything about immorality or morality or criminalization or anything like that"); *see also* Trans. at 868. In Petitioners' own words, "Amendment 2 expresses no moral judgment on homosexuality, but rather is a plain injunction against certain types of governmental action." Def. Colo. S. Ct. Brief at 43 n.65.

CONCLUSION

For all the foregoing reasons, the judgment of the Colorado Supreme Court should be affirmed.

Respectfully submitted,

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